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No. 02-1510

IN THE

Supreme Court of the United States

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,

Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF

JONATHAN I. BLACKMAN
JUSTIN ANAND
CLEARY, GOTTLIEB, STEEN & HAMILTON
One Liberty Plaza
New York, New York 10006
(212) 225-2000

MATTHEW D. SLATER *
CLEARY, GOTTLIEB, STEEN & HAMILTON
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 974-1500

Attorneys for Petitioner

* Counsel of Record

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REPLY BRIEF

Petitioner Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") respectfully submits this reply in further support of its Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit ("Pet."), and in response to the Brief in Opposition of Respondent Karaha Bodas Company, L.L.C., dated May 2, 2003 ("Opp.").

ARGUMENT

Indonesian law conclusively establishes that Pertamina's right to receive its so-called Retention Fee exists *only in Indonesia* and only in the future. Pertamina has no present property interest in the particular funds currently located in the New York trusts that are being attached. Pertamina's

intangible, future property interest is not "in the United States" as the Foreign Sovereign Immunities Act ("FSIA") requires, 28 U.S.C. § 1610(b), for attachment of or execution on that interest.

1. This Court has never previously addressed the attachment and execution provisions of the FSIA. This is an appropriate case to interpret and clarify those provisions, embodied in 28 U.S.C. §§ 1609-1611, and to resolve the confusing and contradictory decisions by courts of appeals and district courts applying (and not applying) those provisions. The court of appeals' decision to permit attachment in contravention of the "in the United States" limitation in Section 1610(b) is a particularly egregious example of the failure of some lower courts faithfully to implement the FSIA's limitations on attachment. Because this case involves intangible assets and obligations of great consequence for the international money-center banking functions carried out in New York and elsewhere in the United States, the case is of significant commercial importance. The decision below has restrained, improperly, hundreds of millions of dollars that are a substantial part of the hard-currency foreign-exchange account of the Government of Indonesia, and thus the case also has important foreign policy implications.

2. The court of appeals allowed restraint and execution of dollars in New York based on a future right to receive payment in Indonesian rupiah from separate accounts abroad. That is not what Section 1610(b) of the FSIA allows. Both the district court and court of appeals relied on Indonesian law to conclude that the natural gas revenues at issue are owned by the Ministry—not Pertamina. The court of appeals accepted that the share of the trust funds nominally in Pertamina's name in the New York accounts must be entirely paid over to "the Ministry's account at the Federal Reserve Bank of New York." 313 F.3d at 91, Pet. App. 32a. From there, the funds are transferred to the Ministry's foreign-

exchange account at Bank Indonesia (Indonesia's central bank). *See* Pet. 8-10; *see also* 313 F.3d at 92, Pet. App. 34a (accepting for the purposes of its Retention Fee ruling that "Pertamina may be under an obligation" under Indonesian law to transfer the entire amount of the restrained funds to the Government's account). Thus, that there are funds "quite literally, 'in' New York," Opp. 11, is not meaningful, as those funds are the Government of Indonesia's, not Pertamina's.

a. Pertamina has only a future interest in unspecified funds, and under Indonesian law that right exists only in Indonesia. No portion of the restrained trust funds in New York is "transfer[red] back to Pertamina" in the form of its Retention Fee, contrary to Respondent's claim. Opp. at 11. Rather, Pertamina is paid in Indonesia by the Ministry in rupiah out of the Ministry's account at Bank Indonesia. These rupiah are necessarily distinct from whatever property exists or existed in New York. *See* Pet. at 8-11.

Pertamina thus has no rights to the specific property under restraint to which a judgment creditor could succeed and upon which it could execute. At most, it *will be owed a debt* by the Ministry. However, that debt accrues in Indonesia under and subject to Indonesian law, is payable solely within Indonesia, and is paid in Indonesian currency. To find that this gives rise to an intangible right susceptible to attachment and execution by a federal district court in New York is to excise the "in the United States" limitation from the text of Section 1610(b) of the FSIA. Further, even if one were to conclude—erroneously—that Pertamina's future right is property in New York, such a property right could not justify restraint and execution on the funds in the trust accounts because those belong to the Government, which is immune from suit and attachment and execution.

b. The question posed, therefore, is whether Pertamina's future right to payment from the Indonesian Government in Indonesia of an obligation that arises in Indonesia under

Indonesian law is subject to attachment in the United States. The question is *not* one "of ownership of the New York deposits and their location," Opp. 12, nor does it turn on the funds being "on deposit in Pertamina's name, subject to its possession and control," Opp. 11. For example, a trustee or nominee may hold property in its name and subject to its control, but its right is not superior to the party for which it holds the property, and such property is not subject to execution by the creditors of the trustee. That is the nature of Pertamina's relationship to the New York accounts, *see* 313 F.3d at 86, Pet. App. 22a-23a, and the question presented therefore is *not* a "factual dispute." Opp. 11.[1] Pertamina's right to its Retention Fee, the procedures governing payment of that fee, and Pertamina's relationship vis-à-vis the restrained funds are pure questions of law—in this case Indonesian law—as the district court and court of appeals ruled. *See, e.g.*, 313 F.3d at 88, Pet. App. 26a. Moreover, the situs of Pertamina's intangible future property interest is also a question of law subject to the FSIA. *See Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 265 (5th Cir. 2002) ("the situs of the intangible royalty obligations" is a "legal question"); *Fidelity Partners, Inc. v. Philippine Exp. & Foreign Loan Guarantee Corp.*, 921 F. Supp. 1113, 1119

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[1] The cases Respondent cites to suggest a fact question, Opp. 11-12, are not remotely on point. *See Anglemyer v. Hamilton County Hosp.*, 58 F.3d 533, 537 (10th Cir. 1995) (under Kansas law, the existence of an implied contract giving rise to a property interest in continued employment is usually a fact question); *Green v. City of Hamilton Hous. Auth.*, 937 F.2d 1561, 1563-64 (11th Cir. 1991) (discussing whether employee established existence of a contract providing a property interest in continued employment); *Kentucky Co. v. Hayes*, 407 F.2d 1031, 1035 (6th Cir. 1969) (discussing existence or extent of a bankrupt's interest in a U.S. savings bond jointly payable to her and her spouse under applicable law and existing facts); *Pope v. City of Clearwater*, 767 F. Supp. 1147, 1150 (M.D. Fla. 1991) (determining whether a public utility customer could possess a property interest implicated (and taken) by the utility's methods for calculating security deposit and its retention of interest on the deposit).

(S.D.N.Y. 1996) (determining the situs of a sovereign-debtor's intangible debt for purposes of the "in the United States" limitation as a matter of law); *Alejandre v. Republic of Cuba*, 42 F. Supp. 2d 1317, 1340 (S.D. Fla.), *rev'd on other grounds*, 183 F.3d 1277 (11th Cir. 1999) (same).[2]

c. The decision below obfuscates the question of how the "in the United States" limitation of the FSIA applies to debts and other intangible property rights. It focused exclusively on the physical location of particular funds in which Pertamina has no present rights, and it made no effort to grapple with the legal situs of Pertamina's intangible, future debt that is the property interest actually at issue. The decision below is not alone in this regard, as other courts have similarly failed to apply or avoided applying the "in the United States" limitation to intangible property rights. *See, e.g., Connecticut Bank of Commerce*, 309 F.3d at 265; *id.* at 266 (Dennis, J., dissenting in part from denial of rehearing) (criticizing panel for "shirk[ing] its duty" to guide the district court regarding the situs question). But still other courts dealing with this issue have correctly recognized the need to fix a legal situs to intangible property rights for FSIA

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[2] To petitioner's knowledge there are not any factual issues involved in the case. Indonesian law provided the basis for both the district court's and the court of appeals' rulings regarding the ownership of the funds. *See* Fed. R. Civ. P. 44.1. Respondent has not submitted a cross-petition for certiorari, in that or any other respect. Because the case turns on questions of law in an area never previously addressed by the Court—the execution provisions of the FSIA—as well as Indonesian law, and not the particular terms of specific instruments, this case does not share the fact-bound characteristics of *Citibank, N.A. v. Wells Fargo Asia Ltd.*, 495 U.S. 660, 674 (1990) (Rehnquist, C.J., concurring), which otherwise recognized that foreign law could constrain the disposition of funds in the U.S. and that the happenstance of the presence of a branch bank's home office in New York did not dispose of the question of whether a deposit could be collected from the home office. *See id.* at 672-74. The Court will not find a more straightforward context than this case in which to examine the situs question as to execution against intangible property under the FSIA.

purposes, and have engaged in an extensive analysis of interests, not simply of the location of the judgment-debtor's debtor. *See Fidelity Partners,* 921 F. Supp. at 1119; *Alejandre*, 42 F. Supp. 2d at 1340. As Justice Cardozo (then Chief Judge) opined long ago, the situs of intangible assets "is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them." *Severnoe Secs. Corp. v. London & Lancashire Ins. Co.,* 255 N.Y. 120, 123, 174 N.E. 299, 300 (1931). This is such a case.

An interest-based evaluation of all pertinent factors should be applied that takes account of such issues as what law governs the obligation between the judgment-debtor and its debtor, when and where the obligation will be paid, the domicile or residence of the debtor and debtor's debtor, and where the funds on account originated, as well as factors that may be unique to sovereigns, such as inter-party immunity. To the extent that courts have engaged in such an analysis, however, it has been sui generis in the absence of guidance from this Court. *Compare Fidelity Partners*, 921 F. Supp. at 1119 (finding debt obligation to be outside the United States, and therefore rejecting execution against New York branch of bank) *with Alejandre*, 42 F. Supp. 2d at 1340-41 (allowing execution on payments made through Canadian bank accounts). In all events, whatever the mode of situs analysis, the decision below is improper. The Government of Indonesia cannot be sued in New York; the locus of interest—including for governing law, payment, and domicile—is Indonesia, not New York; the right to payment arises only in the future; and the funds distributed from the New York trusts were for payments made by foreign purchasers for Indonesian gas—none originated from U.S. purchasers.

The inconsistent and unsupervised treatment by lower courts of this recurring issue of sovereign immunity law warrants review and clarification by this Court, particularly given Congress's emphasis on "the importance of developing

a uniform body of law [under the FSIA]," H.R. Rep. No. 94-1487 at 32, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6631.

3. The decision below cannot be supported by Pertamina's contractual waiver of sovereign immunity. *See* Opp. 6, 9. To so hold would conflict with the plain text of the statute and decisions of other circuits. The default rule of Section 1609 is that no execution is permitted unless a statutory exception under Section 1610 or 1611 applies (one of which is waiver). 28 U.S.C. § 1609. Then, execution is permitted only as to "property in the United States." *Id.* §§ 1610(a), (b). The Fifth Circuit and the numerous district courts that have considered this question have thus all held that the protections of Section 1610 of the FSIA—including the "in the United States" limitation—apply to attachment and execution actions even where the sovereign has waived immunity. *See Connecticut Bank*, 309 F.3d at 247 ("Even when a foreign state completely waives its immunity from execution, courts in the U.S. may execute only against property that meets these two statutory criteria," *i.e.*, the "in the United States" limitation and the commercial activity limitation); Pet. 16-18.

4. Review by this Court is supported by foreign policy concerns. This case is about a private creditor's attempt to use U.S. courts to seize precious U.S. dollar-denominated assets of a foreign state held in the U.S. Those assets are used to meet domestic and international sovereign commitments important not only to the foreign state but to the United States and to the International Monetary Fund and other international bodies. Respondent's suggestion that those concerns simply be ignored, Opp. 14, is not tenable.

Moreover, U.S. money-center banks would suffer commercial injury if the decision below were to stand. If foreign sovereign deposits were vulnerable to attachment simply because the sovereign happens to owe money to a sovereign judgment-debtor somewhere else in the world, foreign entities would logically bank elsewhere.

5. Respondent seeks to divert attention by focusing on proceedings in other courts and ad hominem attacks. *E.g.*, Opp. 3-6. Those proceedings have no bearing on the issues presented here, nor could they justify disregard of the FSIA, and still less could they justify taking property of the Indonesian Government to satisfy a judgment against a juridically distinct sovereign instrumentality. Congress perceived "*compelling reasons*" why "Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality," H.R. Rep. No. 94-1487 at 29, *reprinted in* 1976 U.S.C.C.A.N. at 6628 (emphasis added), and enjoined the judiciary to take responsibility "to determine whether property 'in the custody of' an agency or instrumentality is property 'of ' the agency or instrumentality," *id.* at 28, *reprinted in* 1976 U.S.C.C.A.N. at 6627.

More generally, the other proceedings are subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, U.S.T. 2517, T.I.A.S. No. 6997, codified at 9 U.S.C. §§ 201 *et seq.* Those matters are proceeding in an orderly fashion as provided under the Convention and relevant rules. *See generally Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 2003 WL 21027134, No. 02-20042 (5th Cir. Mar. 5, 2003). *See also Karaha Bodas Co. v. Virginia Indonesia Co.*, 57 Fed. Appx. 535, 537, 2003 WL 294519 at *2, Nos. 02-2480 & 02-3029 (3d Cir. Feb. 12, 2003) (dismissing KBC's appeal of stay orders as "sophistic"); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, No. 0203 03768 (Alta. Ct. Queen's Bench Feb. 20, 2003) (available at www.albertacourts.ab.ca/jdb/1998-2003/qb/Civil/2003/2003abqb0168.pdf) (dismissing KBC's appeal from order allowing newly-discovered evidence to be used in

U.S. and other proceedings).[3] The unprecedented anti-suit injunction issued by the Southern District of Texas is on appeal. *See Karaha Bodas Co.*, 2003 WL 21027134 at *3. The temporary restraining order of which Pertamina was held in contempt has long ago been superceded. *See* Opp. App. 87a. The proceedings in Indonesia continued to judgment because the Indonesian court rejected Pertamina's request to suspend the case while Pertamina appealed the preliminary injunction in the United States. *Cf. Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964) ("'The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum.'") (quoting *Peck v. Jenness*, 7 How. 612, 625 (1849)); *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970) ("It is settled that the prohibition of [28 U.S.C.] § 2283 cannot be evaded by addressing the order to the parties or prohibiting utilization of the results of a completed state proceeding.") (citations omitted). None of that should distract from the issue properly presented by this petition.[4]

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[3] None of these decisions were included in Respondent's voluminous and superfluous appendix.

[4] Respondent hints that the decision below is not final, Opp. 7, but it does not challenge this Court's jurisdiction nor could it. The decision below is the Second Circuit's final word on the amenability of the Retention Fee to execution in the United States, warranting review now. Finality for purposes of post-judgment attachment or execution has a different benchmark than that for an appeal before judgment. A post-judgment attachment order is final when it resolves issues concerning attachment of particular property. *See, e.g., Giove v. Stanko*, 49 F.3d 1338, 1341-42 (8th Cir. 1995); 15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3916 (2d ed. 1992).

CONCLUSION

For the reasons stated in the petition, in this reply, and in the corresponding petition filed by the Ministry of Finance of the Republic of Indonesia (No. 02-1509), the petition should be granted, as should No. 02-1509, and the cases should be consolidated for briefing, argument, and disposition.

Respectfully submitted,

JONATHAN I. BLACKMAN
JUSTIN ANAND
CLEARY, GOTTLIEB, STEEN
& HAMILTON
One Liberty Plaza
New York, New York 10006
(212) 225-2000

MATTHEW D. SLATER *
CLEARY, GOTTLIEB, STEEN
& HAMILTON
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 974-1500

Attorneys for Petitioner

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* Counsel of Record